SUBJECT INDEX

INDEX OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1953

Nos. 198, 199

MICHIGAN-WISCONSIN PIPE LINE COMPANY,

Appellant

vs.

ROBERT S. CALVERT, ET AL.,

Appellees

Nos. 200, 201

PANHANDLE EASTERN PIPE LINE COMPANY,

Appellant

vs.

ROBERT S. CALVERT, ET AL.,

Appellees

Appeals by each Appellant from Both the Supreme Court of Texas and the Court of Civil Appeals for the Third Supreme Judicial District of Texas

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BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

As permitted by Rule 7 of the Rules of this Court, Michigan-Wisconsin Pipe Line Company, appellant in Nos. 198 and 199 and Panhandle Eastern Pipe

Line Company, appellant in Nos. 200 and 201, submit herewith their joint brief in opposition to identical Motions to Dismiss or Affirm filed in behalf of the officials of the State of Texas who are appellees in said causes.

I.

The Jurisdictional Question

Appellees take no position as to whether appellants' appeals are properly from the Supreme Court of Texas or from the Court of Civil Appeals. Their motions to dismiss both appeals are based wholly upon the merits of the controversy, and they ask, in the alternative, that this Court affirm the decrees of *both* the Supreme Court and the Court of Civil Appeals.

For that reason it is respectfully suggested that a determination of the question of jurisdiction be postponed to consideration of the merits so that appellees may have an opportunity to state their position as to whether, in cases where the Supreme Court of Texas refuses a writ of error, an appeal is properly taken from that Court or from the Court of Civil Appeals.

II.

The Merits of the Controversy

1. The Tax is Laid upon the Privilege of Engaging in Interstate Commerce.

Appellees, in their Statement Opposing Jurisdiction, fail to address themselves to what is, after all,

the basic issue, namely, what is the effect of the tax upon the interstate transportation of natural gas. Instead, they state baldly:

"The tax in question is not levied upon the privilege of engaging in interstate commerce. . . The tax is placed upon the privilege of engaging in the business of taking or retaining possession of the gas for transmission, a local activity. . ."

In making these statements appellees assume the answer to the question at issue. The entire controversy is whether or not the "taking or retaining possession of gas for transmission" to other states *is* a "local activity" that can be divorced from the integral economic process of interstate commerce. *Memphis Steam Laundry v. Stone*, 342 U.S. 389, 393 (1952). Appellants demonstrated in their Statement as to Jurisdiction that the "taking possession" of a commodity by a carrier for immediate interstate transportation is obviously and necessarily a part of the transportation itself, and cited decisions of this Court directly to that effect.[1] Appellees have not attempted to show this Court how a carrier can possibly transport goods in interstate commerce without first taking possession of the goods, nor have they attempted to answer this Court's statements that "the transportation in commerce, at the least, begins with the loading and ends

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[1] E. G. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947); *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90 (1937); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (1885).

with unloading"[2] and that "Transportation implies the taking up of persons or property at some point and putting them down at another."[3]

Appellees incorporate in the first part of their motions a so-called "proposition of law" which, they say, governs this appeal:

"Although a person is engaged solely in interstate commerce, a state may validly levy a non-discriminatory tax upon a *local incident or activity* of the interstate business, which is *separate and apart* from the actual flow of commerce, provided the taxpayer is receiving from the state levying the tax benefits, protection or opportunities which bear a fiscal relationship to the tax." (Emphasis supplied).

The proviso to this "proposition of law" is surplusage. The remainder of the proposition is undisputed. Appellants fully recognize that a state may validly levy a non-discriminatory tax upon a local activity which is separate and distinct from commerce, even though it is closely related to commerce, both in time and movement. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 433. Thus, a state may impose a tax on property within a state, measured by its value, even though that property is used exclusively in interstate commerce, and it may, of course, impose a tax on the production of oil, gas or coal, on the generation of electricity, or on the manufacture of merchandise, even though the

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[2] *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 427 (1947).

[3] *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203 (1885).

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commodity so produced, generated or manufactured is immediately transported to other states. But these activities are complete within themselves and are separate and distinct from the subsequent interstate movement in commerce.

The question here is not whether a state may tax an activity that is separate from commerce. It is whether or not taking possession of gas for immediate transportation to other states (an activity described by the state court as "loading an interstate pipeline") *is* separate and apart from interstate commerce. This basic issue is not discussed by appellees.

Of course, the fact that the place of taking possession of gas is at the outlet of a gasoline plant has no more significance than the fact that a carrier receives possession of wheat at the spout of an elevator, of cotton at the platform of a compress, of lumber at the outlet of a sawmill, of coal at the chute, of oil and its products at the loading rack, of automobiles at the loading ramp. If the taking possession of gas for immediate transportation to other states is not a part of commerce, but is separate and distinct therefrom, the same would be true of "taking" possession of telegrams for transmission and of taking possession of wheat, cotton, coal, oil and other commodities for transportation. Cf. *Western Union Telegraph Co. v. Texas*, 105 U. S. 460 (1882); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947). If the theory of appellees were sustained, the inevitable result would be to open the flood gates for burdening interstate commerce in all

classes of commodities with "taking possession" taxes,—a thing the Commerce Clause was designed to prevent.

It is a mere play on words to argue that while a state cannot impose a tax for the privilege of *transporting* commodities to other states, yet it can impose such a tax for the privilege of taking possession of commodities *for* such transportation. On that theory there would, in fact, be no protection of interstate commerce afforded by the Commerce Clause. Transportation of commodities is "impossible or futile" unless the thing to be transported is put aboard the carrying facility and taken off at destination.[4]

2. *Appellees' Discussion of "Benefits, Protection and Opportunities" is not Applicable.*

In a section entitled "Benefits, Protection and Opportunities Afforded by the State of Texas," appellees recite what purport to be advantages accruing to interstate pipeline companies from the general conservation laws of Texas. This recital is apparently an attempt by appellees to bring this case within the following language of Mr. Justice Reed's opinion in *Memphis Natural Gas Co. v. Stone,* 335 U. S. 80, 96 (1948):

> "This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

[4] *Puget Sound Stevedoring Co. v. Tax Commission,* 302 U. S. 90, 92 (1937).

Appellees' makeshift argument is an afterthought conceived long after the legislature passed the Act. Appellees themselves recognize in their "proposition of law" that, even though a tax is related directly to "benefits, protection or opportunities" received from the state, it is invalid unless it is levied "upon a local incident or activity of the interstate business, *which is separate and apart from the actual flow of commerce, . . .*" (Emphasis supplied).

This was a necessary concession since, as Mr. Justice Reed himself pointed out in a subsequent opinion:

"Notwithstanding the wide latitude for taxation of incidents connected with interstate commerce, see *Memphis Gas Co. v. Stone*, 335 U.S. 80, this Court has never interpreted the commerce clause to allow a state tax upon that commerce itself." *Interstate Pipe Line Co. v. Stone*, 337 U.S. 662, 680.[5]

Thus, before considering the question of "benefits, protection or opportunities," it is first necessary to determine whether the "local activity" taxed, the "taking" of gas by a pipeline company into its line for immediate interstate transportation, is sufficiently separate that it can be carved out from the integral economic process of transport-

[5] Similarly, in his dissenting opinion in the *Memphis Natural Gas Co.* case, Mr. Justice Frankfurter said:
". . . we are all agreed that where the only 'local incident' is the fact of interstate commerce—that the interstate pipeline goes through Mississippi—the tax is necessarily a tax upon the privilege of doing interstate business. *The Commerce Clause put an end to the power of the states to charge for that privilege.*" 335 U. S. 80, at 102 (Emphasis supplied).

ing gas. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947); *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952).

As pointed out above, appellees have made absolutely no attempt to show how the fictitious "local activity" here involved can be divorced from the interstate transportation itself, nor have they attempted to distinguish the directly analogous cases cited by appellants. Under these circumstances, the issue of what benefits, if any, appellants receive from the State of Texas is wholly irrelevant. The tax is on the privilege of carrying on interstate commerce itself.

Moreover, assuming the issue to be relevant, it is quite apparent that the so-called "gathering tax" is in no way related to any supposed benefits that pipeline companies receive from the State. As was pointed out in the Statement as to Jurisdiction herein, the purpose of Section XXIII of H.B. 285 was frankly and openly to "tax the pipeline gas that goes out of the State of Texas," and the tax was measured not by any estimate of benefits but by the amount of general revenue its proponents thought was needed. As a member of the Committee stated:

> "You know we have approximately twelve million dollars to raise and you know that twelve million dollars is a large amount of money and it will vitally affect the ones that have to pay it." House Journal, June 1, 1951, p. 2979.

In presenting their theory that the tax is valid because of certain benefits which appellees assert appellants receive as a result of the laws of Texas,

appellees have disregarded the necessity to which this Court has frequently referred, that the words used in an opinion be read in the light of the facts of the case under discussion. *Armour Co. v. Wantock,* 323 U.S. 126, 133 (1944). This is especially true when considering the limitations imposed by the Commerce Clause on the power of the state to tax. *Freeman v. Hewit,* 329 U.S. 249, 252 (1946). This Court has stated that catchwords and labels

". . . are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard."[6]

The words "benefits, protection and opportunities" have never been considered by this Court as passwords which permit a state to impose a tax for the privilege of engaging in interstate commerce.

Those words may, with reason, be applied to taxes imposed on the right to own property and the right to conduct local activities closely related to but separate from commerce itself, such as manufacturing or production, since those rights are derived from the state. But when gas has lawfully been produced, it, like any other commodity, is a lawful article of commerce; and the right to transport the gas to other states, which necessarily includes the right to take possession of it for such transportation, is not derived from the state. That right arises under and is protected by the Commerce Clause. It may not be taxed by the state, "no matter how *specious* may be the pretext" for imposing the tax. *Crutcher v. Kentucky,* 141 U.S. 47, 58 (1891).

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[6] *Henneford v. Silas Mason Co.,* 300 U.S. 577, 586 (1937).

The pretext which appellees urge in support of their contentions is specious indeed.

Texas (and also other oil and gas producing states) has adopted the policy of conserving oil and gas. The Texas statute by which that policy was adopted shows on its face that it was enacted for the purpose of preventing waste and protecting the correlative rights of producers (among themselves) by compelling ratable production.[7] The history of the industry shows that such statutes and regulations issued thereunder are for the protection of producers *against each other* in order that all producers may have an opportunity to produce their fair shares of the total quantity of gas produced from a common pool. Such statutes and regulations have been sustained only because they were enacted and promulgated for that purpose and have that effect. *Champlin Refining Co. v. Corporation Com.*, 286 U.S. 210, 233 (1932); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 69 (1937).

Appellees argue that by the adoption of this conservation program, the State of Texas has "taken" from appellant the "aegis" of the Commerce Clause. That is, indeed, a novel argument. This Court has uniformly held that *only Congress* can remove that shield.

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[7] The "declaration of policy" which is contained in the Texas Conservation Act is as follows:
"In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production." Article 6008, V.A.C.S., Sec. 1.

Apparently, appellees argue that because the state has adopted a gas conservation policy, the economic lives of pipeline companies will be longer than if the state permitted, and the producers elected to commit, waste. That result, however, would be only incidental. If the right to engage in interstate commerce can be taxed by a state because of the circumstance that the state, in order to prevent waste and to protect correlative rights of its local producers, has adopted conservation policies (or any other policies which make the state a favorable one in which to purchase commodities for transportation), the area in which that philosophy could, with equal reason, be urged is almost without limit. Texas and other oil-producing states have similar conservation regulations in order to prevent waste of oil and to protect correlative rights of producers of oil; Texas and other lumber-producing states have stringent regulations for the protection of forests against wanton destruction and for the protection of the correlative rights of those who own such forests; the cotton-producing states have regulations for the elimination of pests and allocations of markets.

But does the circumstance that the state prohibits the waste of oil justify imposing upon those who operate railroads, tankers, trucks and pipelines a privilege tax for the right to take possession of oil and its products, gasoline, kerosene, fuel oil, asphalt, etc., for the purpose of transporting the same to other states? Does the fact that the state adopts a policy of protecting forests justify imposing a tax on railroads, steamships, and trucks for the privilege of taking possession of lumber for transporta-

tion to other states? Can a privilege tax, imposed on the right to take bales of cotton at the compresses or cottonseed oil and cake at the cottonseed oil mills into possession for transportation to other states, be sustained because of the circumstance that, but for the regulations imposed by the state in an effort to control the bollweevil, there would not be as many bales of cotton or as much cottonseed oil or cake available for transportation? If the theory of appellees were approved, a Pandora's box would be opened, and the Commerce Clause would become meaningless.

Appellees refer to the fact that *purchasers* of gas have the "right" to make "nominations" for the purchase of gas. But a purchaser does not obtain gas by making such nominations; nor is he denied the right to purchase gas if he makes no nomination. He is not required to purchase the quantities "nominated" or limited in his purchases to those quantities.

These "nominations" are nothing except estimates of probable purchases, made for the assistance of the Commission in ascertaining the probable demand for gas from the reservoir so that the Commission may allocate the production among the wells producing from the reservoir.[8] The allowable pro-

[8] Section 12 of the Texas Conservation Statute (V.A.C.S. 6008) requires the Texas Railroad Commission to determine each month the "lawful market demand" for gas to be produced from a particular gas reservoir and the volume that can be produced therefrom without waste; and then to fix a monthly allowable of gas to be produced. The Commission is then required to allocate the monthly allowable among all wells "so as to give each well its fair share of the gas to be produced from the common reservoir." The sole object of this procedure is to protect the producer.

duction determined through use of these nominations *guarantees* a producer the right to produce a specified quantity of gas; but a nomination does not guarantee a pipeline company the right to purchase a single cubic foot of gas. If a pipeline company is able to obtain the quantity of gas it nominates, this must be accomplished by negotiations with the producers. In view of this, it is considerably less than accurate to aver that the system of nominations confers special benefits upon pipeline companies.

It is immaterial that a member of the Railroad Commission may think that these "opportunities" which purchasers have to "nominate" or estimate the quantities of gas they hope to purchase justifies a tax on the transportation of gas by the purchaser. No question for expertise is presented. This Court has stated in emphatic language that the federal privilege of carrying on exclusively interstate commerce must be kept *free* from state taxation, *Spector Motor Service v. O'Connor*, 340 U.S., at 610; and this is true no matter how specious the pretext may be for imposing the tax. *Crutcher v. Kentucky*, 141 U.S. 47, 58 (1891).

3. *The Cases Cited by Appellees do not Sustain Appellees' Contentions.*

Appellants, in their Statement as to Jurisdiction, cited three cases[9] in which this Court has made it perfectly clear that loading and unloading an inter-

[9] *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 427 (1947); and *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203 (1885).

state shipment are not only parts of interstate commerce,—they are parts of interstate transportation, and are not local activities separate from interstate commerce. Those cases are directly in point here, but appellees do not refer to any of them.

In an effort to sustain their contention, appellees cite *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940), *Memphis Natural Gas Co. v. Stone* (the opinion of three Justices in that case), 335 U.S. 80 (1948); *Freeman v. Hewit*, 329 U.S. 248 (1946); and *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951). It is believed that the authors will be surprised to learn that their opinions in those cases are relied on to support appellees' contentions, (a) that loading a pipeline with gas for immediate transportation to other states is a local activity, separate and apart from commerce, and (b) that because a state enacts laws in the interest of producers of gas, the state may impose a tax for the "privilege" of transporting commodities there purchased to other states.

Wisconsin v. J. C. Penney Co., was not even a case involving the Commerce Clause. The only question there was as to the validity, *under the due process clause*, of a tax imposed upon the earnings of the company from intrastate business that were paid out in dividends. The other three cases cited by appellees are Commerce Clause cases in which the principles relied upon by *appellants* were stressed and applied. Indeed, in two of those cases the state tax was held invalid under the Commerce Clause.

In *Spector Motor Service Co. v. O'Connor*, supra, the most recent of the cases cited by appellees, the

Court concluded its opinion with the following ringing statement:

"In this field there is not only reason but well established precedent for keeping the federal privilege of carrying on exclusively interstate commerce *free* from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law—*McCulloch v. Maryland*, 4 Wheat 316, supra."[10] (Emphasis supplied).

Appellees would reopen the questions decisively settled against their contentions in the stevedore cases and again in the *Spector* case.

It is submitted that this Court should order these appeals for hearing, reserving the question of jurisdiction to consideration of the merits.

Respectfully submitted,

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[10] 340 U.S., at 610.

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